82-959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CASE NO. _____

STATE OF FLORIDA,

Petitioner,

-vs-

KEN KILPATRICK and
CHERIE KILPATRICK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
FLORIDA'S FIRST DISTRICT COURT OF APPEAL

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QUESTION PRESENTED

I.

WHETHER THE LOWER COURT CORRECTLY FOUND THAT THE OPEN FIELDS DOCTRINE DID NOT APPLY TO MARIJUANA FOUND GROWING IN AN OPEN FIELD APPROXIMATELY FIFTY YARDS FROM A DEFENDANT'S RESIDENCE?

II.

WHETHER THE LOWER COURT CORRECTLY REFUSED TO APPLY A GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT?

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TO FLORIDA'S FIRST DISTRICT
COURT OF APPEAL

The Attorney General of the State of Florida petitions this Court for a writ of certiorari to review the judgment of Florida's First District Court of Appeal in this case.

OPINION BELOW

The official opinion of Florida's First District Court of Appeal is reported as Kilpatrick v. State, 403 So.2d 1104 (Fla. 1st DCA 1981).

JURISDICTIONAL STATEMENT

The judgment of Florida's First District Court of Appeal was rendered September 17, 1981 (A-1). Discretionary review was sought in the Supreme Court of Florida, and that court entered an order staying all proceedings and tolling the time for all further proceedings pending disposition of the State's petition for review (A-23). On September 14, 1982, discretionary review was denied (A-25), and rehearing was denied on November 9, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3) because the lower court has decided a substantial

federal question in a manner contrary to applicable decisions of this Court as well as several federal courts of appeal. The opinion upon which review is sought became final after the Florida Supreme Court refused to exercise discretionary review when rehearing was denied on November 9, 1982. See Banks v. California, 395 U.S. 708 (1969), which stands for the proposition that this Court will not exercise its discretionary certiorari jurisdiction unless the petitioner first attempts to obtain discretionary review in the state's highest court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Federal Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Federal Constitution provides in pertinent part that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents Ken and Cherie Kilpatrick (husband and wife) were charged by the State Attorney of Jackson County, Florida, with the offenses of possession of narcotic paraphernalia and possession of controlled substances contrary to Florida's drug laws. Prior to trial, a motion to suppress was filed in which the Respondents alleged that their rights guaranteed them by the Fourth Amendment to the United States Constitution and Article I Section XII of the Florida Constitution had been violated.[1] After an evidentiary hearing,

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[1] Florida's appellate courts have concluded that the search and seizure provision of the Florida Constitution is identical to that of the Fourth Amendment to the United States Constitution. State v. Hetland, 366 So.2d 831 (Fla. 2d DCA 1979), approved, 387 So.2d 963 (Fla. 1980). In any event, the lower court's opinion was based only on the Fourth Amendment and defense counsel cited Wong Sun v. United States, 371 U.S. 471 (1963).

the trial court denied the motion to suppress, and both Respondents pled nolo contendere while reserving their right to appeal the trial court's denial of their motion to suppress.

At the evidentiary hearing, the State presented the testimony of Officer Ron Steverson of the Sneads, Florida, Police Department. The officer testified that he had received a tip from an informant that marijuana plants were growing on Respondent's Ken Kilpatrick's father's farm. Because the tip was not sufficient to allow him to obtain a search warrant, the officer decided to contact Respondent's father, whom he knew personally, to ask him about the marijuana. The officer drove down a county maintained road until he came upon a road turning off into Respondent's father's farm. The officer testified that he did not know where Respondent's father

lived and he proceeded down a long dirt road approximately one-half mile until he rounded a bend and saw several tall marijuana plants growing in a field.[2] As he proceeded around the bend, he observed a trailer approximately forty to fifty yards from where the marijuana was growing. This trailer was leased by Respondents from Respondent Ken Kilpatrick's father.

Approximately thirty minutes later Respondent Ken Kilpatrick's father arrived and asked what was going on. Officer Steverson learned from him that the trailer belonged to Respondent Ken Kilpatrick, and the officer requested that the father

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[2] Officer Steverson's testimony conflicts with the lower court's finding of fact that the officer saw the marijuana plants from the trailer. The officer's testimony was uncontradicted that he did not see the trailer until he rounded the bend in the road after he had already observed the marijuana plants.

telephone his son and ask him to come to the scene. When Ken Kilpatrick arrived at the scene, he was arrested and given his Miranda warnings, after which the officer requested that he be allowed to look inside the trailer. Ken Kilpatrick initially refused to allow the search of his trailer, but the father interceded and persuaded his son to cooperate with the police. Respondent Ken Kilpatrick subsequently signed a consent to search form which was introduced into evidence without objection. A search of the trailer subsequently revealed narcotics and narcotic paraphernalia prohibited by Florida's drug laws.

During argument on the motion to suppress, the prosecutor first argued that Respondent Ken Kilpatrick had no standing to contest the legality of the search because the search took place on land owned

by Respondent Ken Kilpatrick's father. The prosecutor then quoted at length from Justice Holmes' opinion in Hester v. United States, 265 U.S. 57 (1924), for the proposition that the Fourth Amendment's protection afforded to people in their persons, houses, papers, and effects was not extended to open fields.

Respondents' lawyer countered with the argument that because the police officer was a trespasser, he had no right to be on the property and that anything discovered in plain view by the police officer was suppressible as fruit of the poisonous tree. He claimed that because the initial search was illegal, the subsequent search of the trailer was also illegal. He did not address the State's open fields argument.

The trial court orally denied the motion to suppress. On appeal, the State

again argued that Respondents lacked standing to raise the legality of the search of someone else's property. The State also argued that Respondents' plain view argument was inapplicable because the case was controlled by the open fields doctrine of Hester, supra. The State argued in the alternative that the search should be upheld under a good faith exception to the Exclusionary Rule.

In a written opinion, Florida's First District Court of Appeal reversed and ordered that the fruits of the search be suppressed. This opinion has been reproduced in its entirety in the appendix to this petition (A-1). The State filed a Motion for Rehearing En Banc, also reproduced in the Appendix (A-8), again relying upon Hester, supra and also relying upon Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974),

a more recent open fields case. This motion was unsuccessful and subsequent discretionary review was denied by the Supreme Court of Florida.

REASONS WHY THE WRIT SHOULD BE GRANTED

ARGUMENT

I. THE LOWER COURT INCORRECTLY REFUSED TO RELY UPON THE OPEN FIELDS DOCTRINE OF HESTER V. UNITED STATES.

The lower court reversed the trial court's denial of Respondents' Motion to Suppress on the rationale that since the officer was trespassing, he had no right to be in a constitutionally protected area and that everything that was subsequently seized was inadmissible as fruit of the poisonous tree. The lower court made this determination even though the open fields doctrine of Hester v. United States, 265 U.S. 57 (1924), had been relied upon extensively both at trial and on appeal. It is significant that in Hester itself, Justice Holmes stated that even if there

had been a trespass, the search and seizure were still legal.

The lower court was apparently influenced by its erroneous conclusion that the marijuana plants were located on the curtilage of Ken Kilpatrick's leasehold interest, and therefore both Respondents had reasonable expectations of privacy in what was growing on their property.[3]

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[3] Should there be any doubt about whether the plants were located on the curtilage of Respondents' leasehold interest, Officer Steverson testified that he was still in his automobile on the dirt road when he observed the marijuana plants in plain view before he could even see Respondents' trailer. On cross-examination by defense counsel, Officer Steverson testified that the plants were behind a dry creek bed approximately fifty yards away from the trailer. Assuming only for the sake of argument that the lower court correctly found that Respondents had standing to contest the search of property owned by Ken Kilpatrick's father, it is extremely doubtful that the lower court correctly found that the marijuana was located on the curtilage of Respondents' property. Neither Respondent introduced any evidence of the extent of the leasehold interest. (cont'd on next page)

Kilpatrick v. State, 403 So.2d 1104, 1106 (Fla. 1st DCA 1981). See Murphy v. State, 413 So.2d 1268, 1270 (Fla. 1st DCA 1982), in which the same lower court distinguished Respondents' case:

> In Kilpatrick the officer was within the curtilage of the defendants' home when he observed the marijuana. The court held that he had no right to be there and therefore the observation could not be justified under the plain view doctrine.
>
> * * *
>
> . . . the distinction between the "plain view" doctrine and the "open fields" doctrine lies in the possessor's expectation of privacy in the area observed. If an officer is in a constitutionally protected area and he has no right to be there, items which he views there may not be seized under the plain view doctrine. If, however, the area observed is not constitutionally protected,

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The lower court apparently assumed that the area in which the marijuana plants were found was included in the leasehold interest, thus allowing both Respondents to have standing to object to the search. Kilpatrick, supra at 403 So.2d 1106.

evidence obtained pursuant to the observation may be admissible under the "open fields" doctrine.

The lower court made this distinction even though the revenue officers who testified in Hester, supra, were lying in wait on the curtilage of Hester's property when they observed the illegal moonshine whiskey. Although the lower court did not say so, it apparently concluded that this Court's opinion in Katz v. United States, 389 U.S. 347 (1967), has modified the open fields doctrine of Hester. This is the construction of the open fields doctrine currently popular in the Supreme Court of Florida. See Florida v. Brady, Case No. 81-1636, which is currently pending decision on the merits in this Court on this identical issue. See also DeMontmorency v. State, ___So.2d___ (Fla. 1982), in which the Florida Supreme Court relied upon Brady and Katz to invalidate a

warrantless search of an open field -- the Florida Supreme Court legitimized criminal activity by finding that the defendant had created (via Katz) a legitimate expectation of privacy by trying to hide her marijuana plants behind a fence and by having dogs to guard her property. Citing Hester and its open fields doctrine, the Florida Supreme Court found that the doctrine was inapplicable if the property was thoroughly enclosed.

It is significant to note that even in Katz itself, this Court cited Hester for the proposition that an open field was not a constitutionally protected area. Katz, supra at 389 U.S. 351.

It should also be noted that this Court has never retreated from the rule announced in Hester and that, in addition to citing the open fields doctrine approvingly in Katz, the Court has also cited the rule in

a number of recent decisions. See, e.g., Donovan v. Dewey, 452 U.S. 594 (1981) (Rehnquist, J., concurring); Rakas v. Illinois, 439 U.S. 128, 143, n. 12 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1977); United States v. Santana, 427 U.S. 38, 42 (1976); and Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974).

In addition to the fact that the lower court's holding conflicts with the open fields doctrine approved in the previously cited cases, the lower court's opinion also conflicts with an en banc decision of the Sixth Circuit Court of Appeals. In United States v. Oliver, 686 F.2d 356 (6th Cir. 1982), cert. pending, the court of appeals sitting en banc reversed a panel decision which had found that the owner of an open field may have a fourth amendment expectation of privacy in that field and

that Hester had been impliedly overruled by Katz. The panel decision was reversed, and the Sixth Circuit specifically noted that Katz itself recognized the continuing validity of the Hester open fields doctrine.

Petitioner recognizes that the words "open fields" are not mentioned in the lower court's opinion. However, as previously asserted, the State argued the validity of the open fields doctrine both in the lower court and on appeal. The fact remains that the lower court has decided a substantial federal question in a manner directly contrary to decisions of this Court. This Court has previously recognized that when an aggrieved party properly presents the appropriate federal question both in the trial court and on appeal, the Court has jurisdiction regardless of whether the opinion sought to

be reviewed mentions the federal question. See e.g., Street v. New York, 394 U.S. 576, 582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). Should there be any doubt about the presentation of the federal question both in the trial court and on direct appeal, the Court should be aware that the entire hearing on the motion to suppress has been transcribed and is part of the record on appeal. Similarly, the State's appellate brief is also available to demonstrate that the federal question was raised and rejected on direct appeal.

II. ASSUMING ARGUENDO THAT THE LOWER COURT PROPERLY REJECTED THE OPEN FIELDS DOCTRINE, THE SEIZURE OF CONTRABAND FROM THE OPEN FIELD AND THE TRAILER SHOULD BE UPHELD UNDER A GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

Assuming that the Court declines to exercise discretionary review on the open fields issue, review should still be granted on the theory of a good faith exception to the Fourth Amendment warrant requirement. This issue was rejected by the lower court although it had been squarely presented on appeal:

> Finally, the warrantless seizure of the marijuana plants should be upheld as a "good faith exception" to the warrant requirement. United States v. Williams, 622 F.2d 830 (5th Cir. 1980), cert. denied, 67 L.Ed.2d 114 (1981). Contra, Walden v. State, 397 So.2d 368 (Fla. 1st DCA 1981).

(State's Answer Brief of Appellee at 14.)

Since this issue is currently pending on the merits in Illinois v. Gates, Case

No. 81-430, certiorari should be granted and the case should be held pending disposition of Illinois v. Gates, if review is not granted on the open fields issue. Keney v. New York, supra.

CONCLUSION

The lower court incorrectly refused to apply the open fields doctrine to a warrantless search of marijuana plants growing in plain view in an open field approximately fifty yards from Respondents' trailer. The lower court has apparently concluded that Katz, supra allows a criminal to manufacture an expectation of privacy in an open field even though Katz itself recognized the continuing validity of the open fields doctrine. Since this issue is presently before the Court in Florida v. Brady, supra, Petitioner respectfully requests that the Court grant

certiorari and hold the case pending resolution of Florida v. Brady. See Keney v. New York, 388 U.S. 440 (1967), which provides support for retention of a case while certiorari is pending in a similar or identical issue.

Similarly, if review is not granted on the open fields issue, the Court should grant certiorari and hold the case pending disposition of the good faith exception in Illinois v. Gates.

Respectfully submitted:

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